SOAH DOCKET NO. 582-10-4184
TCEQ DOCKET NO. 2005-1490-WR

CONCERNING THE APPLICATION	§	**BEFORE THE STATE OFFICE**
	§	
BY THE BRAZOS RIVER	§	
AUTHORITY FOR WATER USE	§	**OF**
PERMIT NO. 5851 AND RELATED	§	
FILINGS	§	**ADMINISTRATIVE HEARINGS**

THE DOW CHEMICAL COMPANY'S EXCEPTIONS TO PROPOSAL FOR DECISION

TO THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW The Dow Chemical Company ("Dow"), and files these Exceptions to the Administrative Law Judges' ("ALJs") Proposal for Decision ("PFD") regarding the above-referenced application ("Application") by Brazos River Authority ("BRA" or "Applicant") for Water Use Permit No. 5851, and would show the Texas Commission on Environmental Quality ("TCEQ" or "Commission") as follows:

I. INTRODUCTION

The ALJs have issued their PFD recommending the Commission either: 1) deny the Application or 2) defer a final ruling on the Application by providing BRA with time to prepare its Water Management Plan ("WMP") and remanding the Application back to the State Office of Administrative Hearings ("SOAH") for further hearings on the WMP. ***See*** **PFD at 193.** For reasons set forth herein, Dow agrees with most of the recommendations of the ALJs with the exception of a few points discussed below. Accordingly, Dow respectfully requests that the Commission deny the Application in its entirety.

II.
BACKGROUND AND STATEMENT OF FACTS

BRA is the owner of water rights for eleven reservoirs and owns water rights associated with eight reservoirs owned by the U.S. Army Corps of Engineers. BRA's earliest water right is dated April 6, 1938. Dow's February 28, 1929 water right is senior to all of BRA's water rights. BRA filed a complex application for a System Operation Permit ("SysOp Permit") on June 25, 2004, requesting a new appropriation of state water for multiple uses. Through operation of twelve reservoirs as a system, the Application requests a permit to use heretofore unappropriated water that would not otherwise be beneficially used without construction of new reservoir storage. The Application also requests the ability to appropriate return flows. The Application was declared administratively complete by TCEQ on October 15, 2004. The case was protested and referred to SOAH on May 5, 2010. A preliminary hearing was held on June 7, 2010 and formal discovery began. Discovery concluded on April 8, 2011. An Evidentiary Hearing was held before SOAH on May 9, 10, 12, 13, 16, 17, 18, 19, 20 and 31, and June 2, 2011. Closing Arguments were filed on July 29, 2011, and Reply Briefs were filed August 19, 2011. SOAH issued its PFD to all parties on October 17, 2011.

III.
DOW'S EXCEPTIONS AND ARGUMENTS

As stated by the ALJs in their PFD, BRA failed to meet its burden of proof during the Evidentiary Hearing on its Application. Subject only to the exceptions hereinafter noted, the ALJs' PFD is favorable to Dow.

A. Exceptions to ALJs' Section "XI. BENEFICIAL USE"

Dow excepts to the treatment of beneficial use in the PFD. The beneficial use

analysis does not conform with TEX. WATER CODE § 11.134(b)(3)(A), which requires that prior to granting a new appropriation, the commission must find that the water constituting the new appropriation is intended for beneficial use. The ALJs stated, "that BRA met its burden of proof that the SysOp Permit appropriations are intended for beneficial use." ***See* PFD at 68.** While Dow agrees that the portion of water under the SysOp Permit that BRA actually uses will be used for a beneficial purpose, BRA testified that it will not be able to use all of the water it seeks to have appropriated to it under its SysOp Permit. **Tr. Pg. 673, Ln. 24; Tr. Pg. 287, Lns. 16-21.** There is no question that one seeking to appropriate water has the burden to prove that all the water sought will be beneficially used before the permit can be issued. The ALJs correctly recognize that "[i]t is in the state's interest, therefore, to make sure that a person seeking an appropriation of water will beneficially use it, because appropriating water to an applicant reduces the amount of water the state will have to appropriate to others." ***See* PFD at 63.** The decision in this hearing should not provide precedent for an appropriation of water that the applicant cannot prove it will actually use.

In the PFD, Dow's beneficial use arguments appear to be subsumed to the two-step permitting process. ***See* PFD at 65.** Dow suggests the uncertainty of the second step in terms of the amount of water appropriated means that the position taken by the ALJs in the PFD in this area is incomplete. If there were such a thing as a two-step permitting process, and water is appropriated in the first step there needs to be a mechanism in the second step to reduce the amount of water appropriated under the permit to the amount of water that the applicant can actually demonstrate it can

beneficially use in the second step. Otherwise, the two-step process can be used to circumvent the requirements of the TEX. WATER CODE §11.134(B)(3)(A).

Further, most of the discussion by BRA indicates that if the WMP development indicates the amount of water BRA will beneficially use is less than the amount of water authorized in the SysOp Permit, BRA will take this into account by reducing the amount of water it sells. This does not address the beneficial use concept. Just reducing the amount of water that BRA contracts to sell does not change the fact that the issuance of the draft permit would appropriate water to BRA that it has not proven it can use. Therefore, the PFD should state that if the two-step approach is used (by deferring final ruling on the Application and remanding it to SOAH for consideration of the WMP), the amount of beneficial use proven by BRA in the WMP process, if less than the amount sought for permit, should replace the values now in the draft SysOp Permit.

B. Exceptions to ALJs' Section "XII. ENVIRONMENTAL FLOWS"

1. FISH AND WILDLIFE HABITATS AND WATER QUALITY

Dow excepts to the treatment of environmental flows in the PFD in that the relative benefits of using the Rosharon Gage instead of the Richmond Gage for the environmental flow requirements were not evaluated by the ALJs. During the Evidentiary Hearing, witnesses testifying on behalf of BRA admitted that having the environmental flow requirements applicable at the Richmond Gage could result in diversions under the proposed permit reducing most of the flow in or completely drying up the lower Brazos River below the Gulf Coast Water Authority diversion points. **Tr. Pg. 1867 Ln. 20 – Pg. 1872 Ln. 4; Tr. Pg. 2187 Ln. 7 – Pg. 2188 Ln. 19;** ***see also*** **Exhibit Dow 35**. It appears that approving an appropriation that would allow the

proposed water right to dry up a substantial segment of the Brazos River does not meet the requirements of TEX. WATER CODE §§ 11.134, 11.147, 11.1471, 11.150 AND 11.152, even under the ALJs determination that these requirements are "not onerous." ***See* PFD at 74.** It should be noted that the portion of the Brazos River that could be affected by the proposed water right is in Segment 1202, which has designated uses of high quality fish and wildlife habitat and contact recreation. ***See* 30 TEX. ADMIN. CODE § 307.10(1).**

2. SALINITY

The ALJs devoted an entire section of the PFD to address the salinity issues argued by Dow (and some of the other protestants). Dow agrees with the ALJs' finding that "the law requires the Commission to consider whether BRA's proposed permit would adversely affect water quality and impair senior water rights by leading to an increase in salinity." ***See* PFD at 88.** However, Dow takes exception to the ALJs' conclusion that "approval of the Proposed Permit would not alter salinity in the Brazos River Basin to an extent that impaired water quality, was detrimental to the public welfare, or impaired senior water rights, including Dow's." ***Id.***

As a basis for this conclusion, the ALJs state that "the evidence shows that salinity levels, specifically for chlorides and Total Dissolved Solids (TDS), would not rise above the Commission's WQS due to BRA's operation under the Proposed Permit." ***Id.*** This statement by the ALJs is erroneous because: 1) no factual evidence exists in the record to allow the ALJs to make this determination; and 2) the ALJs' reliance on the Texas Surface Water Quality Standards ("TSWQS") is flawed.

As the moving party in this matter, BRA has the burden of proof. 30 TEX. ADMIN. CODE § 80.17 (2011) (Tex. Comm'n on Envtl. Quality, Burden of Proof); 30 TEX. ADMIN.

CODE § 297.45(d) (2011) (Tex. Comm'n on Envtl. Quality, "No Injury" Rule) ("The burden of proving that no adverse impact to other water right holders or the environment will result from the approval of the application is on the applicant."). Yet BRA failed to produce one shred of evidence showing that its Application would not have adverse affects on the quality of water available to existing water rights. **Tr. Pg. 36, Lns. 15-18** (Mr. Forte stated that BRA did not perform any water quality studies as part of developing the application for the SysOp Permit); **Tr. Pg. 87, Ln. 20** (Mr. Forte testified that BRA had not undertaken studies to address the potential impact of its operation of its reservoirs on salinity in the lower Brazos River); **Tr. Pg. 1328, Lns. 1-9** (Mr. Finley stated, "I put all of BRA's prefiled testimony, all of their documents into a database, and I ran a search trying to find the word 'chloride,' trying to find the word 'TDS,' trying to find the word 'salinity.' There was not a single mention of any of those three words in any of their prefiled work, in spite of the fact that, quite honestly, BRA knows and has known for decades that there's substantial salinity issues in all of the main stem reservoirs."). BRA has known about these water quality issues for a long time and chose not to present any evidence to address its statutory burden of proof on this issue. ***See*** **Exhibit Dow 11** (document produced by BRA during discovery titled "Natural Salt Pollution" stating that "Brazos River Authority has been concerned with the salt problem for many decades").

The evidence cited by the ALJs in the PFD was only limited opinion testimony from BRA witnesses. The ALJs cite to testimony from BRA's expert, Dr. Wurbs, in which he stated, under cross-examination from Dow, that his "conclusion is basically that the system operation permit will have very little impact on salinity in the Lower Brazos,

and it may actually help." ***See*** **PFD at 93; Tr. Pg. 675, Lns. 14-16.** However, Dr. Wurbs later admitted that he had not done a comparison of salinity values at the Richmond Gage with and without BRA's SysOp Permit. **Tr. Pg. 681, Lns. 5-12.** Dr. Wurbs testified, "all the work I've done related to the water right permit application has been as a private consultant, and in that work we did not look at salinity." **Tr. Pg. 680, Lns. 17-20.** The ALJs also referenced testimony by Dr. Harkins in which he stated that maintaining 7Q2 "flows in the draft permit will help maintain the water quality in the Brazos River Basin." ***See*** **PFD at 93; BRA Ex. 29, Pg. 41, Lns. 8-10.** Dr. Harkins' opinion that maintaining 7Q2 flows will "help" maintain water quality does not meet BRA's statutory burden of proof that BRA's Application will not impair existing water rights with regard to water quality.

The other BRA evidence cited by the ALJs on this issue was not provided by BRA in support of its Application; it was provided to discount or invalidate evidence presented by Dow. BRA provided no independent analysis as to how the operation of its reservoirs under the Application would affect the quality of water available to existing water rights. BRA ignored the issue completely, despite knowing that salinity was a major issue in the Brazos River Basin, and waited for Dow to present its evidence on salinity. Then BRA attempted to invalidate Dow's evidence. At most, based on this attempted impeaching evidence, the ALJs could have found that Dow (and the other protestants) did not prove that BRA's Application would impair existing water rights by increasing salinity through operation of its reservoirs. However, the burden of proof on this issue lies with BRA to prove that its Application does not impair existing water

rights and never shifts to protestants. The evidence (or lack thereof) was not sufficient to prove that BRA would not impair the water quality of existing water rights, as the ALJs found in the PFD.

The ALJs ignore the fact that BRA has admitted its operations do impact salinity. The ALJs state that, "BRA contends that it takes salinity implications into consideration when reasonably feasible, for example when making releases for downstream customers." ***See* PFD at 93 (*citing* Tr. Pg. 2245).** The testimony cited by the ALJs includes the following exchange between FBR's counsel and BRA's witness, Mr. Brunett:

> "Q Okay. Does the Brazos River Authority change its operations when salinity levels are high upstream?
> A Not necessarily. We do consider – when we're making releases for our downstream customers during periods of low flow, that is one of the things that we look at. And if salinities are high, we're trying not to release water from solely Lake Whitney. We try to release water from the tributary reservoirs, to the extent that we can, to help with that situation."
> **Tr. Pg. 2245, Lns. 6-14.**

In this testimony, BRA admits that its current operations do in fact affect salinity levels downstream, so much so that they consciously change their operations by trying not to release water solely from Lake Whitney to protect their downstream customers. ***See also* BRA's Post-Hearing Written Argument at 43, fn. 21** ("When reasonably feasible, BRA takes salinity implications into consideration, for example when making releases for downstream customers."). Dow simply requests that the ALJs provide its water rights the same protection that BRA already seems to at least consider for its downstream customers.

Dow contends that since BRA's current operation of its reservoirs affects downstream salinity in this manner, it is certainly possible (or perhaps likely) that BRA's

operations under the new Application will also affect salinity, especially considering the operational flexibility afforded to BRA under the draft permit. BRA's draft permit specifically includes the following special condition:

> The request for operational flexibility to use any source of water available to Permittee to satisfy the diversion requirements of senior water rights to the same extent that those water rights would have been satisfied by passing inflows through the Permittee's system reservoirs on a priority basis is granted, but limited as follows:
> a) To water previously stored in Permittee's reservoirs as documented in the accounting/delivery plan required in Special Condition 6.C.1 above;
> b) Use of this option shall not cause Permittee to be out of compliance with Special Condition 6.C.1. and Special Condition 6.C.6.
>
> ***See* BRA Exhibit 18 at 16 (Special Condition 6.C.7).**

This special condition allows BRA to meet a call against one of its reservoirs from water from any source. If a senior water right holder in the lower Brazos River, such as Dow, were to make a priority call for water that would, absent Special Condition 6.C.7, be satisfied with low chloride concentration water from one of BRA's tributary reservoirs, this provision gives BRA the flexibility to instead release high chloride concentration water from one of BRA's main stem reservoirs to satisfy the call. This is allowable under this condition in the permit, and it could result in serious harm to Dow's operations and impairment of its water rights.

The ALJs state that "the evidence shows that salinity levels, specifically for chlorides and Total Dissolved Solids (TDS), would not rise above the Commission's WQS due to BRA's operation under the Proposed Permit." ***See* PFD at 88.** Even assuming, for the sake of argument, that BRA presented evidence sufficient enough to make this determination, the ALJs reliance on the WQS is misplaced for several reasons.

Dow specifically excepts to the ALJs statement that "[t]he evidence and law do not show that Dow's senior water rights entitle it to water with a quality better than the WQS." ***Id.*** The evidence clearly shows that the WQS do not adequately protect Dow's water rights. Dow's witness, Mr. Finley, provided the following testimony with regard to the impacts of chloride concentrations:

> "Chlorides play a very important role in establishing the allowable cycles, metallurgy, and treatment approach. We desire chlorides concentration in the feed water to be as low as possible. As chloride in the feed water reach the 150-200 mg/L range we begin to incur added cost, and above roughly the 250 mg/L range we can no longer limit cycles to control impact and begin to put some of our equipment at substantial risk for damage or failure. When chlorides reach the 350 mg/L range we struggle across the entire site to be able to manage cycles to protect equipment and we dramatically increase the failure risks for hundreds of millions of dollars of exchanger equipment. These constraints and issues are common to nearly all industrial users of water in the Lower Brazos River."
> **Exhibit Dow 1A at Pg. 17, Ln. 22 – Pg. 18, Ln. 5.**

No party presented any evidence that controverted this evidence presented by Dow. This clearly shows that chloride concentrations lower than the WQS damage Dow's equipment and inhibit its operations, thereby impairing its water rights.

This problem is compounded by the fact that the WQS are only annual averages. "The criteria for Cl^{-1} (chloride), SO_4^{-2} (sulfate), and TDS (total dissolved solids) are listed in this appendix as maximum annual averages for the segment." 30 TEX. ADMIN. CODE § 307.10(1) (notes explaining Appendix A). As discussed by the ALJs, the maximum annual average for chlorides in the WQS is 300 mg/L for segment 1202 (which includes Dow's Harris diversion point). ***See*** **PFD at 91**; 30 TEX. ADMIN. CODE § 307.10(1). Hypothetically, if Dow provided conclusive proof during the Evidentiary Hearing that BRA's SysOp Permit would cause chloride concentrations to increase to 500 mg/L for half the year and lower to 100 mg/L for the other half of the year, would the ALJs still

conclude that the Dow was not entitled to better water quality than what is listed in the WQS? Under this scenario, the chloride restrictions in the WQS would have been satisfied on an annual basis, yet Dow would be unable to utilize its water rights for half the year. This shows that the ALJs' reliance on the annual averages in the WQS is misplaced.

The ALJs contention that Dow has no "legal" right to water of a higher quality than the WQS is obviously incorrect. From a legal applicability standpoint, the WQS were not even in place at the time that Dow's water rights were granted.[1] As the ALJs note, "[t]he priority dates for Dow's water rights are 1929, 1942, 1951, 1952, 1960, and 1976." ***See* PFD at 88.** The ALJs position would lead one to believe that water rights had no right to water of a certain quality before the WQS were adopted. Texas case law clearly shows that this is not the case.

Texas courts have consistently held that an existing water right is entitled to a "usable" quantity and quality of water; "usable" meaning that it must be of a quantity and quality such that it can be used for the purpose for which it was originally permitted. *See Bigham Bros. v. Port Arthur Canal & Dock Co.*, 97 S.W. 686 (Tex. 1906) ("The plaintiffs, as riparian owners, had the right to take from the bayou water with which to irrigate their rice farm, and in that right was also included the right to have that water in its natural condition, at least that nothing should be introduced into it which would be injurious to its quality for irrigation purposes."); *Biggs v. Lee*, 147 S.W. 709, 711 (Tex. Civ. App.—El Paso 1912, writ dism'd w.o.j.) (A water right owner is "entitled to sufficient water for his land's purposes. This necessarily means sufficient usable water…"); *Hale v. Colorado River Mun. Water Dist.*, 818 S.W.2d 537, 541 (Tex. App.—

[1] It was not until 1961 that the Texas Legislature passed the Texas Pollution Control Act, establishing the

Austin 1991, no writ) ("We conclude that the rights of a riparian landowner who has irrigation authority include the right 'that nothing should be introduced into [the water] which would be injurious to its quality for irrigation purposes.'") (*citing Bigham*); *see also Wright v. Best*, 19 C.2d 368, 378, 121 P.2d 702, 709 (1942) (California Supreme Court stated that "it is an established rule in this state that an appropriator of waters of a stream, as against upper owners with inferior rights of user, is entitled to have the water at his point of diversion preserved in its natural state of purity, and any use which corrupts the water so as to essentially impair its usefulness for the purposes to which he originally devoted it, is an invasion of his rights."). These cases articulate the legal standard of protection for senior water rights in Texas from the water quality effects of diversions and impoundments by a junior water right holder. A junior water right holder must not divert or impound water in a manner that reduces the amount of water of a usable quality available to senior water right holders. This standard may be more stringent or more lax than the TSWQS. Based on the uncontroverted testimony of Mr. Finley, with respect to chloride and TDS, the protection for Dow afforded it as a senior water right holder is more stringent than that provided by the TSWQS. Given the fact that Dow's water rights were granted before the TSWQS were promulgated, the ALJs assertions that the water quality protection afforded Dow's water rights are circumscribed by the TSWQS implicitly asserts that the promulgation of the WQS reduced Dow's rights. The ALJs do not explain how this is constitutionally possible for the TSWQS to diminish Dow's vested property rights. This circumstance alone means that the ALJs' position on the degree to which Dow's water rights are protected from the water quality effects of junior water rights is erroneous. Such a holding would also impair the vested property

rights of a substantial number of (approximately 1,200) water rights holders on the Brazos River. Granting water rights that impair these existing water rights could create a cause of action against the state of Texas for taking or damaging property. Creating these financial obligations for Texas absent clear statutory intent is not something the ALJs should lightly precipitate.

Like Texas case law, the TCEQ regulations do not support the ALJs reliance on the WQS. The ALJs correctly recognize that "the Commission chose through the No Injury Rule to protect a certain quality for senior appropriators." ***See*** **PFD at 101.** However, the ALJs then somehow reason (with no explanation) that the No Injury Rule is satisfied with regard to water quality as long as the WQS are satisfied. This ignores the plain language of the TCEQ regulations. The TCEQ rules regarding the No Injury Rule state the following:

> (a) *The granting of an application for a new water right* or an amended water right *shall not cause an adverse impact to an existing water right* as provided by this section. An application for an amendment to a water right requesting an increase in the appropriative amount, a change in the point of diversion or return flow, an increase in the consumptive use of the water based upon a comparison between the full, legal exercise of the existing water right with the proposed amended right, an increase in the rate of diversion, or a change from the direct diversion of water to on-channel storage shall not be granted unless the commission determines that such amended water right shall not cause adverse impact to the uses of other appropriators. *For the purposes of this section, adverse impact to another appropriator includes: the possibility of depriving an appropriator of the* ***equivalent*** quantity or *quality of water that was available with the full, legal exercise of the existing water right before the change*; increasing an appropriator's legal obligation to a senior water right holder; or otherwise substantially affecting the continuation of stream conditions as they would exist with the full, legal exercise of the existing water right at the time of the appropriator's water right was granted.
>
> 30 TEX. ADMIN. CODE § 297.45(a) (Tex. Comm'n on Envtl. Quality, "No Injury" Rule) (emphasis added).

The ALJs review this section and then ask: "What quality of unimpaired water is Dow entitled to as a senior appropriator?" ***See* PFD at 101.** There is no reason to ask this question, because the plain language of the TCEQ regulation clearly requires that a new application not deprive an appropriator (such as Dow) of an "equivalent" quality of water. The regulation does not state, as the ALJs find in the PFD, that an adverse impact occurs only when the WQS are not satisfied. The WQS are never even mentioned in the No Injury Rule section of the TCEQ regulations. This standard in the TCEQ rules of not depriving an appropriator of an "equivalent" quality of water is similar (and perhaps even more strict) than the standard in Texas case law Dow cites above. It certainly does not lessen senior appropriators' rights by allowing new applications to be granted as long as the WQS are satisfied.

The ALJS use of WQS in the PDF disregards clear intent of the WQS, which was to add an *additional layer* of protection for Texas water. It is absurd to suggest that in adopting the WQS, the legislature intended to erode the existing protections for Texas water, which was being provided by water rights holders defending the quality of water they later withdraw from a Texas river to that quality that was present when their water rights were granted. Texas water quality was being defended before the enaction of the WQS by senior water rights holders through causes of action to protect the quality of water they had a right to obtain from Texas surface waters. The legislature decided to supplement this *ad hoc* defense of Texas water quality with a more systematic system, but nothing suggests that the intent was to degrade or eliminate the existing defense of the quality of Texas water.

The ALJs state that "the WQS are protective of water rights." ***See* PFD at 101.**

Dow agrees that the WQS are one mechanism that can help protect the water quality of existing water rights in certain situations; however, the WQS are not the only (or the determinative) protection for existing water rights with regard to water quality. The ALJs quote the following General Policy Statement for the WQS:

> "It is the policy of this state and the purpose of this chapter to maintain the quality of water in the state consistent with public health and enjoyment, propagation and protection of terrestrial and aquatic life, operation of existing industries, and taking into consideration economic development of the state; to encourage and promote development and use of regional and area-wide wastewater collection, treatment, and disposal systems to serve the wastewater disposal needs of the citizens of the state; and to require the use of all reasonable methods to implement this policy."
> 30 TEX. ADMIN. CODE § 307.1.

The ALJs admit this is an "extremely broad statement" which means "that the WQS were protective of a wide range of uses, interests, rights, concerns, and the public welfare." ***See*** **PFD at 101.** As long as the WQS are satisfied, are the other issues that could be interpreted to be covered by this "broad" statement satisfied? Absolutely not. Simply satisfying the WQS does not guarantee that an application protects aquatic life, protects existing industries, is consistent with public health and enjoyment, etc.; neither should satisfaction of the WQS be the sole determinate for protecting the water quality of senior appropriators either. This policy statement reflects that the adoption of WQS provides a floor that will protect a water right, or increase the quality of water, if the water was of a lower quality when appropriated. However, this interaction between the pre-existing right of a water rights holder to defend the quality of water in the source of its water and the WQS does not suggest that the legislature intended for the WQS to replace the pre-existing rights of water rights holders to defend the quality of the water they receive and the quality of the surface water from which the water they take comes.

The ALJs state that "[a]ccordingly, the ALJs conclude that a new water right that would not result in water falling below the Commission's WQS would not impair a senior water right unless the senior water right specifically included a right to divert water of a higher quality than the WQS." ***See*** **PFD at 101.** Basically, the ALJs believe Dow (and other water right holders) should not be afforded water of a higher quality than the WQS unless Dow specifically requested and was granted a special condition stating this protection in the permit. This ignores the history of the WQS and leads to absurd results. As previously stated, the ALJs fail to consider that most of Dow's water rights were granted before the statutes that underlie the WQS were enacted. Dow was not aware at the time it applied for its water rights (decades later in some cases) that WQS would be adopted that these ALJs now suggest for the first time would erode the quality of water included in its water rights. Under the ALJs' approach, Dow would have to go back and amend each of its permits to include specific protections each time a WQS is adopted or amended that is not protective of Texas water as was existing when Dow's water rights were appropriated, or have had the foresight to request special conditions in the permit for every possible criteria at concentrations that might be insufficiently covered by the WQS, or some other to be determined water quality requirement that might be adopted by the Texas legislature in the future (assuming that Dow could have even predicted that there would be WQS in the future at the time the permit was granted).

This is not a practical (or legal) approach to protecting the water quality of existing water rights. From a practical standpoint, if one spends the time and money to obtain a surface water permit from the State for a certain purpose, that should ensure that the permit holder not will be denied through the actions of a junior water right holder

water of a quality sufficient to use the water for that purpose in the future, regardless of the adoption of or changes to WQS that are implemented to address a broad array of issues. As stated before, this also provides water rights holders with a right to high quality water with an incentive to protect their water quality and thereby provide other users of Texas water with incidental protection of the quality of this Texas water.

Finally, Dow excepts to the ALJs recommendation to not accept Dow's water quality special condition. ***See* PFD at 98.** Dow requested that a special condition be added to the permit (to protect water quality) that prohibits operations under the BRA SysOp Permit (preferably applying to both the BRA SysOp Permit and the reservoirs operated as part of the system) to the extent those operations would cause chloride concentrations exceed 250 mg/L and/or TDS exceed 500 mg/L at the Richmond Gage. These concentrations were chosen based on Mr. Finley's testimony as to the concentrations of chlorides and TDS that result in harm to Dow's operations. There was no testimony or other evidence controverting this evidence presented by Dow; there was also no testimony or other evidence presented supporting the ALJs' position that the higher concentrations of 300 mg/L for chlorides and the 750 mg/L for TDS (on a less strict average annual basis) would sufficiently protect Dow's senior vested water rights.

C. Exceptions to ALJs' Section "XIII. PUBLIC WELFARE, PUBLIC INTEREST, AND INSTREAM USES"

Dow excepts to the ALJs' treatment of the public welfare analysis of BRA's Application in the PFD. TEX. WATER CODE § 11.134(b)(3)(C) requires that the Commission find that a proposed application "is not detrimental to the public welfare" before granting the application. There are several aspects to BRA's Application that are detrimental to the public welfare.

Dow believes that approving an application that appropriates water in amounts exceeding the amount of water that the applicant has proven it will actually use is detrimental to the public welfare. Dow believes it was important for the ALJs to state this in the PFD independently of the analysis of the two-step permitting issue for whatever follows. If the Application is dismissed and BRA files a subsequent application that does not use the two-step approach, a specific finding as proposed by Dow will make it clear that the application should only cover the amount of water BRA has shown it will beneficially use. Likewise, if the ruling on the Application is stayed and the WMP is developed and this Application is remanded to SOAH, it needs to be clear that the determination of the amount of water used in the WMP process needs to be not only a limit of the amount of water for which BRA contracts to sell, but also the amount of water appropriated under the Application.

Another aspect in which the Application is detrimental to the public welfare is that it does not limit operations under the permit to the extent necessary to prevent operations from causing an increase in salinity in the lower Brazos River. As described in Section III.B.2 below, that could have a negative affect on water quality, which would adversely affect water usage from the lower Brazos River. ***See also*** **Dow's Closing Argument at 25-45.** Further, if the ALJs maintain the view that the Application eliminates the potential for incidental protection of Texas water through the defense of water quality rights higher that the WQS, granting this Application is detrimental to the public welfare.

As justification for their finding that the Application would not be detrimental to the public welfare, the ALJs state that "BRA's operation under either proposed permit

would not adversely affect senior water rights." ***See* PFD at 105.** However, earlier in the PFD, the ALJs devote an entire section of the PFD to explain how the proposed permit *will* adversely affect senior water rights. ***See* PFD at 41-62** (Section X.C. of the PFD is actually titled "In three specific respects, the Section 11.134 analysis of the SysOp Permit shows that it *will* negatively impact senior water rights"). Because the ALJs found that the Application will adversely affect senior water rights, the ALJs erred by not also finding that the Application is detrimental to the public welfare.

D. Exceptions to ALJs' Section "XVI. RETURN FLOWS"

Dow excepts to the portion of the PFD regarding BRA's request to appropriate future return flows. In the Application, BRA proposed to appropriate the 2060 return flows. These are the return flows predicted in the state water plan to be discharged in 2060. The ALJs recommend granting BRA's request to appropriate return flows if the Commissioners agree with the overall two-step approach. ***See* PFD at 154.** The Commissioners should not agree with the two-step approach presented by this Application. With regard to the appropriation of return flows proposed by BRA, Dow agrees with much of the legal analysis in the PFD but does not agree that BRA should be allowed to appropriate the 2060 return flows.

During the hearing, the TCEQ Executive Director ("ED") argued that BRA can only appropriate return flows resulting from use of water under BRA's water rights, water that is discharged from a BRA wastewater treatment plant, or pursuant to an assignment from a third-party that holds the rights to the return flows. Dow supported, and continues to support, this position of the ED. BRA took the position that it should be allowed to appropriate return flows listed in the water plan as being available by the year

2060. Dow believes that basing an appropriation on a projection in the water plan is too speculative. Dow believes that limiting the appropriation to return flows resulting from the use of BRA water, water discharged from BRA's wastewater treatment plants, or return flows assigned to BRA from a third-party holding the right to the return flows has the necessary certainty to be subject to appropriation.

As stated in that PFD, there are two water code provisions that must be analyzed to address an appropriation of return flows: TEX. WATER CODE §§ 11.042 and 11.046.[2] TEX. WATER CODE § 11.042 relates to the use of the bed and bands of state watercourses to transport state water. State watercourses are on-channel water bodies containing state water such as natural streams and manmade impoundments. There are three subdivisions of TEX. WATER CODE § 11.042. The first, § 11.042(a), deals with release of stored water from a reservoir for bed and banks conveyance of the water to one or more downstream diversion points. The second, TEX. WATER CODE § 11.042(b), addresses bed and banks conveyance of groundwater-based return flows through a state watercourse. The third, TEX. WATER CODE § 11.042(c), deals with the conveyance of water that is not groundwater based return flows using the bed and banks of a state watercourse. Dow agrees with the ALJs that under all three paragraphs, the person seeking the right to convey groundwater using the bed and banks of a state watercourse must hold the rights to the water. This is consistent with the Executive Director's position that TEX. WATER CODE § 11.042 only applies to the owner of the underlying water right associated with the return flows, the discharger of the return flows, or the assignee of rights to the return flows. This section only deals with the right to use state watercourses for bed and banks

[2] The full text of TEX. WATER CODE §§ 11.042 and 11.046 can be found on page 139 and 140 of the PFD.

transport. It is not a pathway for appropriating water. It can, however, be used by a person with the right to water that is being discharged to prevent the water from being appropriated by a third person after it is discharged to a state watercourse.

The other provision regarding return flows is TEX. WATER CODE § 11.046. TEX. WATER CODE § 11.046(c) provides that:

> …Once water has been diverted under a permit, certified filings, or certificate of adjudication and then returned to a watercourse or stream, however, it is considered surplus water and therefore subject to reservation for instream uses or beneficial inflows or to appropriation by others unless expressly provided otherwise in the permit, certified filings, or certificate of adjudication.

Although this language appears to subject return flows discharged to a watercourse to appropriation by others, all of the showings required under TEX. WATER CODE §§ 11.124, 11.125, 11.128, 11.134, 11.147 and 11.150 would have to be made. The problem with basing an appropriation of return flows on the mere fact that they are listed in a water plan is the uncertainty of whether those projected return flows will ever actually exist.

The ALJs should take into account that 11.046(c) is not an independent basis for appropriating water, it just clarifies that return flows, once discharged to a watercourse, are subject to appropriation under other sections of the Water Code. The problem with appropriation of return flows is that it is equally speculative as other components of water covered in BRA's Application—i.e. yield based on storage that has been filled with sediment and yield that is unavailable because of BRA's upstream contractual commitments. It is Dow's position that on a proper showing under 11.134, and other statutes, that BRA could appropriate return flows, but it has made an insufficient showing

to be granted an appropriation of return flows not based on BRA water rights, BRA discharges, or return flow rights assigned to BRA.

E. Exceptions to ALJs' Section "XXIII. NEED FOR A WATERMASTER"

The evidence in this case showed that there is uncertainty as to whether the proposed appropriation will impact senior water right holders. ***See*** **PFD at 48** ("The inescapable fact is that, assuming BRA's application was granted in this matter, it would be impossible to know whether senior water rights would be impacted by the permit until the WMP is approved."). The complexity of the application and the interaction between the proposed new water right and BRA's existing water rights makes the uncertainty of the effect on existing water rights greater than in the normal appropriation situation. Dow's water rights and several other major water rights that are senior to and downstream from BRA's proposed water rights are run of the river water rights (Dow does have some off-channel storage) that can be affected by changes in flow rates caused by BRA's operation of its water rights on time intervals shorter than a month. Whatever support the monthly WAM analysis provides that BRA's application will not impact senior water rights, this analysis may or may not be reflective of what will happen in the real world. ***See*** **PFD at 179-181.** The ALJs concluded that "[i]n the absence of a notice of hearing indicating that a watermaster might be appointed and a specific referral of that hearing to SOAH, the ALJs decline to definitively conclude that a watermaster should be appointed. However, because there is a wide disparity between the assumptions made in the WAM and how water rights are exercised in the real world, it may be prudent for the Commission to consider the appointment of a watermaster for the Brazos River Basin." ***See*** **PFD at 179.**

It is Dow's position that in order to protect senior water rights, there should be a provision that prevents BRA from operating its new water right until there is a watermaster in operation on the Brazos River. In the alternative, TCEQ could make Dow's proposed stream flow restriction applicable to not only the new water right, but to BRA's existing water rights. This streamflow restriction could lessen the need for a watermaster and may be a more economical approach to addressing the potential injury to existing water rights from BRA's SysOp Permit.

F. Exceptions to ALJs' Section "XXVII. RECOMMENDATION"

The ALJs recommend denial of the BRA SysOp Permit for numerous reasons cited in the PFD. The ALJs also provide two alternatives to denial of the permit for potential Commission action with which Dow disagrees. The first is to defer a ruling on the application and remand the application back to SOAH for consideration of the WMP. Dow is not clear how ruling on the WMP would resolve the problems with the current application. If, for example, it after developing the WMP it is determined that not all the water applied for can be used, the amount of water authorized by the SysOp Permit needs to be adjusted accordingly before granting the permit. This will, like in the initial hearing, suffer from the fact that the parties will be engaging in a process without any written rules on how the process shall be conducted. It also would tend to tie up water for an extended period of time that might possibly be useful for others during the ongoing drought.

Likewise, the third alternative of granting the permit, but only for diversions at the three hypothetical diversion points, appears to present problems. Like the second option, this option does not appear to address the finality issue and other problems with

the two-step approach. BRA has not presented testimony that all of the water it seeks in its application can be used at the theoretical diversion points (and likewise has not shown beneficial use for all of the water it seeks to appropriate). There needs to be some intermediate step of reducing the amount of water to the amount that BRA can prove it can beneficially use. ***See* PFD at 49, fn. 158; PFD at 52, fn. 177.** "There is no evidence in the record upon which the ALJs could determine the amount by which diversions at the three other control points should be likewise reduced." ***See* PFD at 53.** For these reasons, Dow believes that the second and third alternatives presented by the ALJs are not advisable.

IV.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Dow prays that the TCEQ deny this Application in its entirety. Dow further requests that all costs be assessed against BRA and that Dow be granted all such other relief as it may be entitled.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of The Dow Chemical Company's Exceptions to the PFD was forwarded via e-mail and/or first-class mail to the parties below on this 7th day of November, 2011.

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